

**OCT 21 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

FRED G. RICE,

Plaintiff-counter-defendant - Appellant,

THE SUNTREE COMPANY, a California  
Corporation,

Counter-defendant - Appellant,

v.

SAFECO PROPERTY & CASUALTY  
INSURANCE COMPANY, Safeco Insurance  
Company of America; AMERICAN STATES  
INSURANCE COMPANY,

Defendants-counter-claimants - Appellees.

No. 02-55199

D.C. No. CV-00-00370-VAP

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted September 8, 2003  
Pasadena, California

Before: KLEINFELD, WARDLAW, and W. FLETCHER, Circuit Judges.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

In this breach of contract action, Fred Rice and Suntree Company, developers of and general contractors for the Los Cabos project in Santa Maria, California, appeal the district court's grant of summary adjudication and entry of judgment in favor of Safeco Property & Casualty Insurance Company ("Safeco") and American States Insurance Company ("American States"), as well as the court's denial of their motion for reconsideration.

This action arises from the failure of Safeco and American States to defend an underlying construction defect action, *Abram v. Suntree Co.*, No. SM 109471 (Cal. Super. Ct. filed Aug. 11, 1998), in which Rice and Suntree were sued for the allegedly defective work of numerous subcontractors who had named them as "additional insureds." Safeco and American States insured only ten of these subcontractors and asserted in the district court that their duty to defend Rice and Suntree was limited solely to the activities of the ten subcontractors that they insured. The district court agreed and determined that Rice and Suntree were not entitled to a complete defense because the coverage due from Safeco and American States extended only to the work of the ten insured subcontractors.

In so ruling, however, the district court did not have the benefit of the California Court of Appeal decision in *Presley Homes, Inc. v. American States Insurance Co.*, 108 Cal. Rptr. 2d 686 (Cal. Ct. App.), *rev. denied* (2001). *Presley*

*Homes* held that a developer named as an additional insured on its subcontractors' policies is entitled to a complete defense, even though indemnification for some claims may have been barred by the policies' "your work" clause. As *Presley Homes* is the decision of an intermediate state court, and the California Supreme Court has not yet spoken on this issue, we must follow its holding in the absence of "convincing evidence that the state supreme court would decide differently." *Bills v. United States Fid. & Guar. Co.*, 280 F.3d 1231, 1234 n.1 (9th Cir. 2002).

American States and Safeco have failed to adduce convincing evidence that the California Supreme Court would reach a result different than that advanced in *Presley Homes*. The cases they cite are readily distinguishable as none deals with the scope of an insurer's duty to defend a mixed action upon tender. *See Bowie v. Home Ins. Co.*, 923 F.2d 705, 709 (9th Cir. 1991) (no potential for coverage); *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.*, No. D037390, 2003 WL 22046158, at \*1 (Cal. Ct. App. Aug. 28, 2003) (equitable contribution); *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 124 Cal. Rptr. 2d 818, 820 (Cal. Ct. App. 2002) (no potential for coverage); *Pardee Constr. Co. v. Ins. Co. of the West*, 92 Cal. Rptr. 2d 443, 454 (Cal. Ct. App. 2000) ("sole issue" was extent of completed operations coverage); *Md. Cas. Co. v. Nationwide Mut. Ins. Co.*, 97 Cal. Rptr. 2d 374, 376 (Cal. Ct. App. 2000) (equitable contribution);

*Miller v. Am. Home Assurance Co.*, 54 Cal. Rptr. 2d 765 (Cal. Ct. App. 1996) (no potential for coverage); *Hartford v. California*, 49 Cal. Rptr. 2d 282, 285 (Cal. Ct. App. 1996) (same); *Fire Ins. Exch. v. Jiminez*, 229 Cal. Rptr. 83, 85–86 (Cal. Ct. App. 1983) (same). Moreover, *Presley Homes* is consistent with other California Supreme Court authority. See *Buss v. Superior Court*, 939 P.2d 766, 775 (Cal. 1997).

While we do not express an opinion on whether *Presley Homes* reaches the correct result, the district court erred by not reconsidering its decision in light of the new law, see C.D. Cal. R. 7.16, and by entering an incompatible judgment. The court’s decision is, therefore, **REVERSED**.<sup>1</sup>

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<sup>1</sup> The Request to File Amicus Brief of 396 Investment Company and Newmeyer & Dillion is granted.